

**CALIFORNIA COASTAL COMMISSION**

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49th Day: April 28, 2005  
Staff: KFS-LB  
Staff Report: March 30, 2005  
Hearing Date: April 13-15, 2005  
Commission Action:

**W24a****STAFF REPORT: APPEAL - SUBSTANTIAL ISSUE**

**LOCAL GOVERNMENT:** City of Dana Point  
**LOCAL DECISION:** Approval with Conditions  
**APPEAL NUMBER:** A-5-DPT-05-091  
**APPLICANT:** Headlands Reserve LLC  
**APPELLANTS:** Coastal Commissioners: Meg Caldwell & Sara Wan  
Surfrider Foundation  
**PROJECT LOCATION:** Generally the northwest corner of Street of the Green Lantern and Pacific Coast Highway (Dana Point Headlands) Dana Point, Orange County

**DESCRIPTION OF APPEALED PROJECT:** Master Coastal Development Permit CDP04-23 for subdivision of 121.3 acres into 126 numbered lots and 27 lettered lots to allow development of 118 single-family homes, 4.4 acres of Visitor/Recreational Commercial development including one 65-90 room hotel and three lots adjacent to Pacific Coast Highway for commercial development not to exceed 35, 000 square feet with 40-bed hostel, a 27.9 acre conservation park and approximately 40.8 acres of additional parks and open space.

**SUMMARY OF STAFF RECOMMENDATION & ISSUES TO BE RESOLVED:**

Plans for development of the Headlands site have been controversial at the local level and before the Commission over the last few years. The Commission approved an LCP amendment for the project in January 2004, which became effectively certified in January 2005. Shortly after effective certification, the City approved the subject coastal development permit. Appeals filed contend the City's approval doesn't follow through on all of the requirements of the LCP. For instance, there are significant questions regarding the extent of work the City's approval would allow upon the revetment in the Strand (which was limited in the LCP to just 'repair and maintenance'). An appeal also contends the City's approval allows impacts to ESHA to occur immediately, but doesn't adequately assure delivery of the public benefits of the project that were required in exchange for allowing those impacts, such as the 40-bed hostel and the filtration and treatment of urban runoff from 17 acres of existing developed area located off-site; but rather defers these benefits to an unspecified future date. These and other allegations raise significant questions regarding the City's approval. Thus, the staff recommends that the Commission, after a public hearing, determine that **A SUBSTANTIAL ISSUE EXISTS** with respect to the grounds on which appeal number A-5-DPT-05-091 has been filed because the locally approved development raises issues of consistency with the City of Dana Point Local Coastal Program and the public access and recreation policies of Chapter Three of the Coastal Act.

At this time, all that is before the Commission is the question of substantial issue. If the Commission determines that a substantial issue exists, a de novo hearing will be held at a subsequent meeting.

**SUBSTANTIVE FILE DOCUMENTS:**

- City of Dana Point Local Coastal Program (LCP)
- File documents submitted by the City under cover letter dated March 17, 2005

**I. STAFF RECOMMENDATION FOR SUBSTANTIAL ISSUE:**

**A. MOTION AND RESOLUTION FOR SUBSTANTIAL ISSUE WITH REGARD TO APPEAL NO. A-5-DPT-05-091**

The staff recommends that the Commission make the following motion and adopt the following resolution:

**Motion:** *I move that the Commission determine that Appeal No. A-5-DPT-05-091 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

**Staff Recommendation:**

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the Commissioners present.

**Resolution to Find Substantial Issue:**

The Commission hereby finds that Appeal No. **A-5-DPT-05-091** presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

**II. SUBSTANTIAL ISSUE FINDINGS AND DECLARATIONS:**

The Commission hereby finds and declares:

**A. APPEAL PROCEDURES**

**1. Appealable Development**

Section 30603 of the Coastal Act states:

(a) *After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:*

(1) *Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or*

*of the mean high tide line of the sea where there is no beach, whichever is the greater distance.*

- (2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.*

Sections 30603(a)(1) and (2) of the Coastal Act establish the project site as being appealable by its location between the sea and first public road, the fact the site is within 300 feet of the inland extent of the beach, the mean high tide line, and the top of the seaward face of a coastal bluff (Exhibit 1).

## **2. Grounds for Appeal**

The grounds for appeal of an approval, by a certified local government, of a local CDP authorizing development in the appealable area are stated in Section 30603(b)(1), which states:

- (b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in [the Coastal Act].*

The grounds listed for the current appeals include contentions that the approved development does not conform to the standards set forth in the certified LCP regarding public access and recreation, biological resources, water quality, visual resources, and hazards, or to the public access and recreation policies set forth in the Coastal Act. Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed pursuant to section 30603. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo public hearing on the merits of the project. The de novo hearing will be scheduled at a subsequent Commission hearing. A de novo public hearing on the merits of the project uses the certified LCP as the standard of review.

One of the appellants (Surfrider Foundation) argues that the CDP granted by the City cannot be approved because the certified LCP amendment violates the Coastal Act and is currently being challenged in court and is apparently suggesting that the Coastal Act remains the standard of review while the LCP amendment is being challenged. However, that claim is only accurate when application of the LCP amendment has been stayed or prohibited by the court, as established in Section 30520 of the Coastal Act.

In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.

## **3. Qualifications to Testify before the Commission**

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The time limit for public testimony will be set by the chair at the time of the hearing. As noted in Section 13117 of Title 14 of the California Code of Regulations, the only

persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project.

At the de novo hearing, the Commission will hear the proposed project de novo and all interested persons may speak. The de novo hearing will occur at a subsequent meeting date. All that is before the Commission at this time is the question of substantial issue.

## **B. LOCAL GOVERNMENT ACTION**

### CDP No. 04-23

On January 19, 2005, the City of Dana Point Planning Commission held a public hearing on the proposed project. At the conclusion of the public hearing, the Planning Commission adopted Resolution No.05-01-19-03 (Exhibit 6), which approved with conditions local Coastal Development Permit CDP No. 04-23 for the project.

The Planning Commission's action was appealed to the City Council by Surfrider Foundation. On February 23, 2005, the City Council held a public hearing on the appeal. At the conclusion of the public hearing, the City Council adopted Resolution No. 05-02-23-07 denying the Surfrider Foundation's appeal and upholding the Planning Commission's approval of the master coastal development permit. The City's action was then final for purposes of the local process and an appeal to the Coastal Commission was filed by Surfrider Foundation (Exhibit 5) and two Coastal Commissioners (Exhibit 4) during the Coastal Commission's ten- (10) working day appeal period.

## **C. APPELLANTS' CONTENTIONS**

The Commission received a notice of final local action on CDP 04-23 on February 24, 2005. As stated previously, CDP 04-23 (assigned appeal no. A-5-DPT-05-091) approved subdivision of 121.3 acres into 126 numbered lots and 27 lettered lots to allow development of 118 single-family homes, 4.4 acres of Visitor/Recreational Commercial development including one 65-90 room hotel and three lots adjacent to Pacific Coast Highway for commercial development not to exceed 35,000 square feet with 40-bed hostel, a 27.9 acre conservation park and approximately 40.8 acres of additional parks and open space.

On March 10, 2005, within ten working days of receipt of the notice of final action, Coast Law Group filed on behalf of Surfrider Foundation an appeal (Exhibit 5) of the local approval on the grounds that the underlying LCP against which the local action was reviewed violates Sections 30240, 30253, and 30235 of the Coastal Act and is being challenged in court on those grounds. Furthermore, the appellant contends that the approval violates Section 30213 of the Coastal Act because no mitigation for loss of sandy beach was secured in the local government's approval. The appellant also contends that the approval violates affordable housing provisions and cites Public Resources Code Section 30604, 30607.2 and Government Code Section 65590. The appellant also contends that the City's approval violates the certified LCP because clearing and grubbing authorized by the City would exceed the 11.29 acres ESHA impact cap established in the LCP (Exhibits 7-9). Finally, the appellant contends the City's CDP allows construction of new

protective devices to protect existing development, in violation of both Section 30253 of the Coastal Act and the certified LCP.

Furthermore, on March 10, 2005, on behalf of the Commission itself, Commissioners Caldwell and Wan appealed the local action on the grounds that the approved project does not conform to the requirements of the certified LCP and the public access and recreation requirements of the Coastal Act (Exhibit 4). Briefly, the Commissioners' appeal contends that the City's approval gives authorization for impacts to Environmentally Sensitive Habitat Area (ESHA) and construction of new development reliant on shoreline protection, but doesn't secure all of the required benefits that the LCP requires to off-set those impacts. The Commission's appeal also contends that the City's approval fails to adequately place limits upon the quantity of work that may occur upon the revetment in order for that work to be considered 'repair and maintenance'. The City's authorization also does not appropriately limit geologic remediation activities at the site such that those activities are consistent with LCP requirements.

The City's approval also raises questions about the mechanisms the City is using to assure the development is consistent with the LCP, the delegation of certain key decisions about hazards related deed restrictions to City staff, the failure to secure expungement of all development rights within open spaces, the adequacy of the public funicular to offset access impacts, the siting of private stairways upon slopes adjacent to the beach and privatization of required public accessways, and the adequacy of the proposed plant restoration palette.

## **D. SUBSTANTIAL ISSUE ANALYSIS**

### **1. Project Location, Description and Background**

#### **a. Project Location**

The subject site is the 121.3 acre Dana Point Headlands site (herein 'Headlands')(Exhibits 1-2). The Headlands, is one of the last undeveloped coastal promontories in Southern California. Topography of the site is varied. The highest elevation on the site is a conical hill that is approximately 288 feet above sea level (a.k.a. the 'hilltop'). The northern portion of the site is the location of a former trailer park on the bluff face. Some of the ancillary improvements including roads, a clubhouse, and tennis courts, still exist. The area of the trailer park, and the steep eroded hillside to the south of it, is referred to as "the Strand." Slope gradients in the Strand range from 1.5:1 to 2:1. An existing dilapidated revetment currently protects the Strand. A former nursery facility is located east of the Strand and south of Pacific Coast Highway and consists of greenhouses, ornamental plantings and disturbed areas, in an area referred to informally as the 'bowl'. South and east of the nursery facility (including upon the Headlands and Harbor Point promontories and upon the hilltop and bowl) lies a large patch of coastal sage scrub (CSS) with patches of southern coastal bluff scrub occurring along the rim of the 'bowl'. Maritime succulent scrub occurs in the hilltop area and southern needlegrass grassland occurs near the Pacific Coast Highway, in the northwesterly portion of the site. Southern mixed chaparral occurs along the westerly portions of the site closest to Street of the Green Lantern.

#### **b. Project Description**

The local government's record indicates that the proposed project is the subdivision of 121.3 acres into 126 numbered lots and 27 lettered lots to allow development of 118 single-family homes, 4.4

acres of Visitor/Recreational Commercial development including one 65-90 room hotel and three lots adjacent to Pacific Coast Highway for commercial development not to exceed 35, 000 square feet with 40-bed hostel, a 27.9 acre conservation park and approximately 40.8 acres of additional parks and open space.

The approval includes authorization for a clearing and grubbing plan that would remove certain existing facilities within the Strand area as well as native vegetation within the proposed limits of grading for the development. The approval also includes grading of the subject site including work upon the existing revetment at the Strand. Furthermore, the authorization includes construction of infrastructure to support the planned development (e.g. utilities and roads) and certain public amenities, such as a network of public trails, public parks, and a funicular. The approval also grants authorization for the construction of 118 residential structures, including custom homes in the Strand, with supporting amenities. The authorization delegates review of the individual residential structures to City staff, without further coastal development permit review, provided those structures comply with the development standards identified in the LCP. However, the approval does not authorize construction of the Seaside Inn, the visitor-serving commercial development, nor the 40-bed hostel. The City's authorization requires a subsequent coastal development permit for these facilities.

**c. Local Coastal Program Certification**

Dana Point is a shoreline community in southern Orange County. Prior to the City of Dana Point's incorporation in 1989, the Commission approved the segmentation of formerly unincorporated Orange County's coastal zone into the Capistrano Beach, Dana Point, Laguna Niguel, and South Laguna segments. Following the City's incorporation in 1989, all of the geographic areas covered by the former Orange County LCP segments of Capistrano Beach, Dana Point, and Laguna Niguel were included within the city limits of the new City of Dana Point. In addition, a portion of the South Laguna segment was within the new City's boundary. The City combined the Capistrano Beach and Dana Point segments, and the portion of the South Laguna segment within its jurisdiction, into one certified LCP segment. After some minor modifications, the City then adopted the County's LCP documents as its first post-incorporation LCP. On September 13, 1989, the Commission approved the City's post-incorporation LCP. Meanwhile, the City did not adopt the LUP which had been certified as the Laguna Niguel segment (which contained the area known as the Strand). In order to differentiate between the new City of Laguna Niguel (which was also incorporated in 1989) and the Laguna Niguel planning area (which was within the new City of Dana Point and not within the new City of Laguna Niguel), the Laguna Niguel LUP planning area was re-named 'Monarch Beach'.

Since initial certification of the City's LCP, the City has taken steps to consolidate the LCP documents and update those documents to reflect the current needs of the City. The first step involved certification of a new land use plan (LUP) and implementation plan (IP) for the Monarch Beach area of the City under LCP Amendment 1-96. This action adopted, with modifications, a new Land Use Plan ("LUP") component consisting of three elements of the City's General Plan: Land Use, Urban Design, and Conservation/Open Space. The implementing actions component of the LCP for the Monarch Beach area is the City's Zoning Code, as changed according to modifications suggested by the Commission (herein referred to as the '1996 LCP'). When the Monarch Beach area was certified, the City chose to defer any action on 'the Strand'. Thus, the Strand remained uncertified.

The second step involved updating the Capistrano Beach area and incorporating it into the 1996 LCP. Similar to LCPA 1-96, LCPA 1-98 adopted the 1996 LCP comprised of the LUP that consists of the three elements of the City's General Plan and the IP consisting of the City's zoning code. The City adopted the modifications to the LUP and IP suggested by the Commission. The modified LCP for Capistrano Beach was effectively certified on July 13, 1999.

Most recently, the Commission approved the City of Dana Point's Local Coastal Program Amendment 1-03 with suggested modifications at the public hearing held in Laguna Beach on January 15, 2004. On August 11, 2004, the Commission adopted the revised findings supporting the Commission's action in January. The LCP amendment amended the Dana Point Local Coastal Program (LCP) to certify the Dana Strand area and replace the 1986 Dana Point Specific Plan LCP as it pertains to the remainder of the 121.3 acre project site with the LCP that consists of the City's 1996 Zoning Code and the Land Use Element, Urban Design Element, and Conservation/Open Space Element of the City's General Plan and amended those documents, through the Headlands Development Conservation Plan (HDCP) to, among other things, authorize creation of a Planned Development District for the site to authorize development of 125 single family residential lots, a maximum of 110,750 square feet of visitor serving commercial land use including a 65-90 room inn, a 35,000 square foot commercial site with visitor information center and 40-bed hostel and 68.5 acres of public parks, coastal trails and open space, and a funicular to serve Strand beach. The LCP amendment became effectively certified on January 14, 2005.

Those certified portions of the City that have not been updated remain controlled by the former County LCP documents that the City adopted when it incorporated. The City continues to incrementally update these areas to bring them into the 1996 LCP. The areas that remain to be updated are the town center and harbor (both of which are within the former County LCP segment known as the 'Dana Point Specific Plan Local Coastal Program', a.k.a. the '1986 LCP').

## **2. Analysis of Consistency with Certified LCP and Public Access Section of the Coastal Act**

As stated in Section II.A.2 of this report, the local CDP may be appealed to the Commission on the grounds that the proposed development does not conform to the standards set forth in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. Pursuant to Section 30625 of the Coastal Act, the Commission must assess whether the appeal raises a substantial issue as to the project's consistency with the certified LCP or the access policies of the Coastal Act.

In making that assessment, the Commission considers whether the appellants' contentions regarding the inconsistency of the local government action with the certified LCP or the public access policies raise significant issues in terms of the extent and scope of the approved development, the factual and legal support for the local action, the precedential nature of the local action, whether a significant coastal resource would be affected, and whether the appeal has statewide significance.

As provided below, the City of Dana Point certified LCP contains policies that protect public access and recreation, biological resources, water quality, visual resources, and require development to address hazards in the coastal zone. Additionally, Section 30213 of the Coastal Act states that lower cost recreational opportunities must be provided and protected. These policies are also provided below and will be discussed in Subsection II.D.2.c. of this staff report.

**a. Local Coastal Program (LCP) Policies**

**Land Use Element (LUE), Goal 5, introductory narrative states (SM<sup>1</sup> 4):**

Development of the Headlands shall occur in a comprehensive manner involving the entire approximately 121 acre site. This comprehensive approach to developing the Headlands will allow for the following project elements (herein 'HDCP Elements'): 1) preservation, enhancement, dedication and perpetual management of all but 11.29 acres of environmentally sensitive habitat areas (ESHAs) known to be present at the Headlands; 2) the dedication of the private portion of Strand beach to the public; 3) the construction and dedication of public parks, a public trail network throughout the Headlands, and vertical and lateral public access to and along Strand beach including realigning the existing revetment an average 5 feet landward or easterly than the existing alignment, implementation of a program to retrieve debris from the beach that impedes public access, and constructing a new lateral public access trail on top or landward of the revetment and seaward of the entire length of the Strand residential development; 4) implementation of extensive water quality management best management practices, including but not limited to the construction and maintenance of structural best management practices to treat off-site and on-site run-off; 5) the preservation of significant landforms including the Harbor Point and Headlands bluffs and promontories and the Hilltop; and 6) the provision of lower-cost overnight accommodations (i.e. hostel) in conjunction with the construction of a luxury inn.

**LUE, Goal 5, Policy 5.4 (SM 10):** Assure that the height and scale of the development within the Headlands are compatible with development in the community and that the visual impact of the development from coastal areas below the project is minimized. Prohibit new development that significantly degrades public views to and along the coastline including, but not limited to, existing, enhanced or created views from the Hilltop park and greenbelt linkage, the Strand Vista Park, the Dana Point Promontory/Headlands Conservation Park and Harbor Point. (Coastal Act/30251)

**LUE, Goal 5, Policy 5.35 (SM 23):** Except as noted in this policy, gates, guardhouses, barriers or other structures designed to regulate or restrict access shall not be permitted upon any street (public or private) within the Headlands where they have the potential to limit, deter, or prevent public access to the shoreline, inland trails, or parklands. In the Strand residential area, gates, guardhouses, barriers and other structures designed to regulate or restrict public vehicular access into the residential development may be authorized provided that 1) pedestrian and bicycle access from Selva Road and the County Beach parking lot through the residential development to the beach remains unimpeded; 2) a public access connection is provided that gives direct access from approximately the mid-point of the County Beach parking lot to the Central Strand Access; and 3) an inclined elevator/funicular providing mechanized access from the County Beach parking lot to the beach is constructed, operated and maintained for public use for the duration of the period that public vehicular access through the residential subdivision is regulated or restricted.

**LUE, Goal 5, Policy 5.36 (SM 24):** Where an inclined elevator/funicular is provided in accordance with Land Use Element Policy 5.35, the facility shall be open to the public every day beginning Memorial Day weekend through Labor Day weekend, and on holidays and weekends the remainder of the year, with additional days of operation as necessary to meet demand. If necessary, a fee may be charged for use of the inclined elevator/funicular to recover costs of operation and maintenance, however, that fee (round-trip) shall not exceed the regular cash fare

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<sup>1</sup> SM = "Suggested Modification". Provided as a cross-reference to the Suggested Modifications made by the Commission in its approval of Dana Point Headlands LCP Amendment 1-03, which is how these provisions became part of the City's LCP.



for a single ride on a local route upon a public bus operated by the Orange County Transportation Authority.

**LUE, Goal 5, Policy 5.42 (SM 30):** The public parks, open space and public trail network shall be offered for dedication and/or conveyed by the landowner/developer to the appropriate public agency or non-profit entity concurrent prior to or with the recordation of the first land division/Final Map(s). The first land division shall encompass the entire 121.3 acre site and shall fully expunge all development rights that may exist within the identified public parks, open space and public trail network that may have existed under any prior land division. All approved public park, open space and public trail network improvements and amenities shall be constructed by the landowner/developer and shall include all such public parks, open spaces, public trails and associated improvements and amenities described in the HDCP. All approved public park and open space improvements and amenities shall be completed and the facilities open to the public for public use prior to the residential certificate of occupancy or final inspection for the first to be completed residential property.

**LUE, Goal 5, Policy 5.43 (SM 31):** In conjunction with the development of a luxury inn at the Headlands, the developer shall install water quality best management practices, including structural best management practices, that shall treat runoff from the development site as well as at least 17 acres of off-site developed area.

**LUE, Goal 5, Policy 5.44 (SM 32):** New development of a luxury overnight visitor-serving inn within the Headlands shall only be developed in conjunction with a component of lower cost overnight visitor accommodations (e.g. hostel) as either part of the project or elsewhere within a visitor recreation commercial area within the Headlands. The lower-cost overnight accommodations shall consist of no less than 40 beds and shall be available for use by the general public prior to or concurrent with the opening of the inn.

**Conservation Open Space Element (COSE), Goal 2, Policy 2.21 (SM 62):** Notwithstanding Conservation Open Space Element Policy 2.28, and in the context of any specific project application that provides all of the HDCP Elements, creation of a residential subdivision of up to 75 homes with associated infrastructure development and public access amenities all dependent upon geologic remediation and the existing shoreline protective device (including such upgrades as are permitted in Conservation Open Space Element Policies 2.22 and 2.23) shall be permitted in the Strand area provided it is consistent with all other applicable policies. Furthermore, in conjunction with any shoreline protective device, a lateral public accessway following the entire length of the protected area shall be constructed seaward of any new residential development and on top of or landward of any shoreline protective device. Maximum feasible mitigation shall be incorporated into the project in order to minimize adverse impacts to resources including local shoreline sand supply. (Coastal Act/30007.5, 30200(b), 30210, 30240, 30250, 30253)

**COSE, Goal 2, Policy 2.22 (SM 63):** In the context of any specific project application that provides all of the HDCP Elements, and only in conjunction with a proposal that completes the plan as a whole, the revetment in the Strand may be repaired and maintained consistent with Conservation Open Space Element Policy 2.23 and subject to the requirements of Conservation Open Space Element Policy 2.31 in order to protect new development in the Strand provided that the repaired and maintained revetment is set further landward than the existing alignment. The revetment shall be located at or landward of the existing revetment toe (depicted on Figure 1, Existing Revetment Alignment (TOE), The Keith Companies dated January 8, 2004), such that, the average position of the revetment is moved 5 feet landward or easterly. All components of the existing revetment

located seaward of the above identified toe shall be removed from the beach and recycled into the new revetment or properly disposed at an approved disposal site. The top edge of the revetment shall not exceed the top edge of the existing revetment located at +17 feet NGVD. The methods by which the repair and maintenance would be conducted shall remain reviewable for consistency with all applicable policies.

**COSE, Goal 2, Policy 2.23 (SM 64):** The establishment of a revetment of the same height and footprint size as the southerly 2,240 feet of the existing revetment, along Strand Beach, through the repositioning of rocks that were once part of the existing revetment, and are still in the vicinity thereof, and the importation of up to 50 percent new rock by volume, including excavation and new bedding material and foundation shall constitute repair and maintenance of the existing revetment. In part, for that reason, such work would not constitute “construction of a protective device that would substantially alter natural land forms along bluffs and cliffs.”

**COSE, Goal 2, Policy 2.28 (SM 69):** All new beachfront and blufftop development shall be sized, sited and designed to minimize risk from wave run-up, flooding and beach and bluff erosion hazards without requiring a shoreline and/or bluff protection structure at any time during the life of the development, except as allowed under Conservation Open Space Element Policy 2.21.

**COSE, Goal 2, Policy 2.30 (SM 71):** As a condition of approval of a coastal development permit for development on a bluff, beach or shoreline which is subject to wave action, erosion, flooding, landslides, or other coastal or geologic hazards associated with development on a beach, shoreline or bluff, the property owner shall be required to execute and record a deed restriction which acknowledges and assumes said risks and waives any future claims of damage or liability against the permitting agency and agrees to indemnify the permitting agency against any liability, claims, damages or expenses arising from any injury or damage due to such hazards.

**COSE, Goal 2, Policy 2.31 (SM 72):** As a condition of approval of a shoreline protection structure in the Strand, or repairs or additions to a shoreline protection structure in the Strand, either of which can only occur consistent with the other provisions of this LCP, the property owner shall be required to acknowledge, by the recordation of a deed restriction, that no future repair or maintenance, enhancement, reinforcement, or any other activity affecting the shoreline protection structure which extends the seaward footprint of the subject structure shall be undertaken and that he/she expressly waives any right to such activities that may exist under Coastal Act Section 30235 and/or equivalent LCP policies.

**COSE Goal 3, Policy 3.12 (SM 78):** In the context of any specific project application that provides all of the HDCP Elements, and only in conjunction with a requirement that the plan be completed as a whole, a maximum of 6.5 acres of ESHA may be displaced along the slopes of the bowl to accommodate development within the bowl, and a maximum of 0.75 acres of ESHA located on the Strand bluff face at the southerly boundary of the Strand may be displaced to accommodate development within the Strand. The amount of ESHA permitted to be displaced may be increased as necessary to accommodate construction of a 65-90 room inn, scaled appropriately to the property, within Planning Area 9 provided that lower-cost visitor overnight accommodations are provided consistent with Land Use Element Policy 5.44. The maximum impacts to ESHA identified in this policy do not pertain to or limit vegetation removal necessary to construct and maintain public trails as identified on Figure COS-4.

**COSE Goal 3, Policy 3.17 (SM 83):** To protect ESHA and minimize adverse visual impacts new structures shall be prohibited on bluff faces excepting repair, re-construction or improvements to

existing, formal public trails or stairways identified in this LCP and the new residential development and new public accessways specifically contemplated by this LCP in the Strand, and in that case only in the context of a project application that provides all of the HDCP Elements, and only in conjunction with a requirement that the plan be completed as a whole. Such structures shall be constructed and designed to not contribute to further erosion of the bluff face and to be visually compatible with the surrounding area to the maximum extent feasible.

**COSE Goal 6, Policy 6.9 (SM 85):** As contemplated in the Headlands Development and Conservation Plan, the Headlands area shall be developed as a unified project, with one exception provided at the end of this policy. The first application for land division within the Headlands seeking development pursuant to the Headlands Development and Conservation Plan shall encompass the entire approximately 121 acre Headlands area and shall include a proposal to cause the expungement of any preceding land division within said area, the dedication of all land therein containing ESHA excepting those areas identified in Conservation Open Space Element Policy 3.12 in such a manner as to ensure that the property is conserved in perpetuity as open space, and the dedication of all parks, beaches and accessways identified in this LCP at the Headlands to the City, County or other willing public agency or non-profit entity in such a manner as to ensure their use in perpetuity for public purposes. The one exception to this requirement shall be that, prior to the wholesale re-division of the 121-acre Headlands area, the landowner may apply for, and the City may approve, any lot merger, lot line adjustment, or other land division necessary to enable the landowner to separate out and transfer approximately 27 acres of land on the Headlands promontory, provided that any such approval is conditioned on the requirement that the area so separated is irrevocably deed restricted as conserved open space in conjunction with the land division and is thereafter dedicated in a manner that ensures that it is conserved in perpetuity as conserved open space, in which case the requirement in the preceding sentence shall apply only to the remainder area of the Headlands.

#### **Headlands Development Conservation Plan (HDCP) Section 3.4.B.5:**

##### **5. Development Requirements for Planning Area 4**

Development of Planning Area 4 shall include the following uses regardless of other development that will occur there:

- a) A 40-bed hostel and Visitor Information Center. The hostel will serve as a lower-cost overnight visitor accommodation and will include a Visitor Information Center that shall provide detailed maps and other information regarding trails, overlooks, open space, parks, beaches and public access thereto, public parking facilities, and other visitor serving recreational and commercial facilities present at the Headlands and in the City of Dana Point and vicinity. Other information may also be provided regarding the biological, historical and cultural aspects of the Headlands, City of Dana Point and vicinity. The hostel and Visitor Information Center shall be constructed and open to the public in accordance with the phasing requirements identified in Section 3.7.C.6. Development Phasing Plan. The Visitor Information Center may be incorporated into the hostel, provided that it is clearly available for use by the general public separate from use of the hostel, or it may be constructed as a separate facility. If separate from the hostel, the Visitor Information Center shall consist of a minimum of 800 sq. ft.
- b) Six (6) public parking spaces in Planning Area 4 to serve open space visitors shall be required over and above the parking required as part of the V/RC uses in Planning Area 4. The six parking spaces shall serve visitors intending to utilize the public open space in the project. The

parking shall be constructed in accordance with the phasing requirements identified in Section 3.7.C.6 Development Phasing Plan.

**HDCP Section 3.4.C.5 (SM 117):**

5. Inclined Elevator/Funicular in Planning Area 1

If any gates, guardhouses, barriers or other development designed to regulate or restrict public vehicular access are approved for Planning Area 2, a funicular (inclined elevator) sized to a minimum capacity of eight persons and available to the public shall be built parallel to the North Strand Beach Access and convey passengers from Strand Vista Park to a ramp to the beach. The funicular shall be made available to the public prior to any regulation or restriction of public vehicular access into Planning Area 2. The funicular shall provide sufficient capacity to ferry a family and associated beach recreational paraphernalia (e.g. chairs, coolers, surfboards, etc.) A reasonable fee for the use of the funicular may be collected to recover maintenance and upkeep for the funicular operation, however, any fee collected (round-trip) shall not exceed the regular cash fare for a single ride on a local route upon a public bus operated by the Orange County Transportation Authority. At minimum, the funicular shall be open to the public during daylight hours on weekends, holidays year-round and every day beginning the Memorial Day holiday weekend through the Labor Day holiday weekend. To the maximum extent feasible, maintenance of the funicular shall occur during scheduled periods of inoperation (e.g. evenings during the peak season/weekdays during the off season). If the funicular becomes inoperable for more than 3 consecutive scheduled operating days (e.g. 3 consecutive days during the peak season/a full weekend plus one day the following weekend during the off season) or the funicular is closed or made inoperable indefinitely or for any sustained time period for any reason, including but not limited to irreparable damage and/or an absence of funding for operation and maintenance, any gate, guardhouse, barrier or other development that regulates or restricts public access through Planning Area 2 shall be opened, removed or otherwise made inoperable such that public access is no longer regulated or restricted for the duration of the period the funicular is unavailable for public use. Signs shall be posted declaring the availability of the funicular to the public, the hours of operation, any fee, and the terms leading to the availability of public vehicular access through Planning Area 2. Signs shall be posted at the boarding area for the funicular, at locations visible to vehicles traveling on Selva Road, and elsewhere as reasonably necessary to assure adequate public notification relative to the funicular.

**HDCP Section 3.5.E. Environmentally Sensitive Habitat Areas (ESHA) (SM 128), states in relevant part:** Excepting up to 0.75 acres of impact in Planning Area 1, 6.5 acres of impact within Planning Area 6, and 4.04 acres of impact to accommodate construction of the seaside inn within Planning Area 9 (all of which are only allowable as provided in Conservation Open Space Element Policy 3.12, new development shall be sited and designed to avoid impacts to ESHA. The maximum impacts to ESHA identified herein do not pertain to or limit vegetation removal necessary to construct and maintain public trails. Impacts to up to 11.29 acres of ESHA shall be fully mitigated, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site. The coastal development permit shall include conditions that require implementation of all feasible mitigation measures that would significantly reduce adverse impacts of the development...[remainder of section not re-printed]

**HDCP Section 3.5.G., Shoreline Protective Device in the Strand (SM 130):** Any shoreline protective device repaired and maintained in the Strand as allowed under Conservation Open Space Element Policies 2.22 and 2.23 shall comply with the following development standards:

The shoreline protective device shall be located at or landward of the existing revetment toe (depicted on Figure 1, Existing Revetment Alignment (TOE), The Keith Companies dated January 8, 2004), such that, the average position of the shoreline protective device is moved at least 5 feet landward or easterly.

At the time of repair and maintenance of the shoreline protective device, all components of the existing revetment located seaward of the above identified toe and landward of the location of the intertidal zone shall be removed from the beach and recycled into the repaired and maintained shoreline protective device or properly disposed at an approved disposal site.

The top edge of the repaired and maintained revetment shall not exceed the top edge of the existing revetment located at +17 feet NGVD.

A shoreline protective device maintenance and monitoring plan shall be implemented that, at minimum, provides for the periodic retrieval and re-use or proper disposal of any rock or other components of the device that has become dislodged and/or has fallen to the beach as well as the retrieval and re-use or proper disposal of any rock or other component of any pre-existing device that becomes exposed on the beach for any reason.

**HDCP Section 3.7.C.6, Development Phasing Plan (SM 139):**

Development shall comply with the following development phasing plan:

Development of the Headlands shall occur in a comprehensive manner involving the entire approximately 121 acre site. The allowance for impacts to up to 11.29 acres of environmentally sensitive habitat areas (excluding public trails) and the allowances relative to the construction of new development in the Strand that is reliant upon significant landform alteration and a shoreline protective device shall only be allowed in the context of a project that: 1) preserves, enhances, dedicates and perpetually manages all but 11.29 acres of environmentally sensitive habitat areas (ESHAs) known to be present at the Headlands; 2) dedicates the private portion of Strand beach to the public; 3) constructs and dedicates the public parks and public trail network described in this HDCP including realigning the existing revetment an average 5 feet landward or easterly than the existing alignment, implementation of a program to retrieve debris from the beach that impedes public access, and constructing a new lateral public access trail on top or landward of the revetment and seaward of the entire length of the Strand residential development; 4) implements extensive water quality management best management practices, including but not limited to the construction and maintenance of structural best management practices to treat off-site and on-site run-off; 5) preserves landforms including the Harbor Point and Headlands bluffs and promontories and the Hilltop; and 6) provides lower-cost overnight accommodations (i.e. hostel) in conjunction with the construction of a luxury inn.

The public parks, open space and public trail network shall be offered for dedication and/or conveyed by the landowner/developer to the appropriate public agency or non-profit entity concurrent with the recordation of the first land division/Final Map(s). The first land division shall encompass the entire 121.3 acre site and shall fully expunge all development rights that may exist within the identified public parks, open space and public trail network that may have existed under any prior land division. The one exception to this requirement shall be that, prior to the wholesale re-division of the 121-acre Headlands area, the landowner may apply for, and the City may approve, any lot merger, lot line adjustment, or other land division necessary to enable the

landowner to separate out and transfer approximately 27 acres of land on the Headlands promontory, provided that any such approval is conditioned on the requirement that the area so separated is irrevocably deed restricted as conserved open space in conjunction with the land division and is thereafter dedicated in a manner that ensures that it is conserved in perpetuity as conserved open space, in which case the requirement in the preceding two sentences shall apply only to the remainder area of the Headlands.

The public parks, open space and public trail network improvements and amenities, including the Nature Interpretive Center and public parking, shall be constructed and open to the public prior to the opening of the luxury inn in Planning Area 9.

The 40-bed hostel shall be constructed and open to the public prior to or concurrent with the opening of the luxury inn in Planning Area 9.

All approved public park, open space and public trail network improvements and amenities, including the Nature Interpretive Center and public parking, shall be constructed by the landowner/developer and shall include all such public parks, open spaces, public trails and associated improvements and amenities described in the HDCP. All approved public park and open space improvements and amenities shall be bonded for final completion (@120% of estimated construction cost) prior to recordation of the first Final Map, and construction shall be completed and the facilities open to the public for public use prior to the residential certificate of occupancy or final inspection for the first to be completed residential property.

The Visitor Information Center in Planning Area 4 shall be constructed and open to the public concurrent with the opening of any other commercial development within Planning Area 4.

The six (6) public parking spaces in Planning Area 4 to serve open space visitors shall be constructed and open to the public prior to or concurrent with the opening of any other commercial development within Planning Area 4.

**b. Coastal Act Policies**

Coastal Act Section 30210:

*In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Coastal Act Section 30213:

*Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

*The commission shall not: (1) require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or other similar visitor-serving facility located on either public or private lands; or (2) establish or approve any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities.*

Section 30604, subsections (b), (c), (f), and (g) of the Coastal Act states:

*(b) After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.*

*(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).*

*(f) The commission shall encourage housing opportunities for persons of low and moderate income. In reviewing residential development applications for low- and moderate-income housing, as defined in paragraph (3) of subdivision (h) of Section 65589.5 of the Government Code, the issuing agency or the commission, on appeal, may not require measures that reduce residential densities below the density sought by an applicant if the density sought is within the permitted density or range of density established by local zoning plus the additional density permitted under Section 65915 of the Government Code, unless the issuing agency or the commission on appeal makes a finding, based on substantial evidence in the record, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with Chapter 3 (commencing with Section 30200) or the certified local coastal program.*

*(g) The Legislature finds and declares that it is important for the commission to encourage the protection of existing and the provision of new affordable housing opportunities for persons of low and moderate income in the coastal zone. (Amended by: Ch. 1075, Stats. 1978; Ch. 919, Stats. 1979; Ch. 285, Stats. 1991, Ch. 793, Stats. 2003.)*

Section 30607.2 of the Coastal Act states:

*(a) Conditions requiring housing for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, which were incorporated into a coastal development permit issued prior to January 1, 1982, may, at the request of the permittee, be amended or modified by the commission or by a local government having the authority to issue coastal development permits. In approving such amendments or modifications, only those conditions and requirements authorized by Section 65590 of the Government Code may be imposed on the permittee.*

**c. Surfrider Foundation Appeal - Analysis of Consistency**

Surfrider Foundation has appealed the City's approval based on five grounds as follows: 1) the City's CDP cannot be approved because the LCPA violates the Coastal Act and is currently being challenged; 2) the City's CDP fails to meet affordable housing requirements under the Coastal Act; 3) the City's CDP violates Coastal Act Section 30213 because the project doesn't mitigate for the loss of beach; 4) the City's CDP allows more than 11.29 acres of ESHA to be impacted and thus violates the LCP; and 5) the City's CDP allows construction of new protective devices to protect existing development, in violation of both Section 30253 of the Coastal Act and the certified LCP. Each of these contentions is discussed below:

- i. The City's CDP cannot be approved because the LPCA violates the Coastal Act and is currently being challenged & The City's CDP fails to meet affordable housing requirements under the Coastal Act

The appellant contends that the certified LPCA for the Dana Point Headlands violates Sections 30235, 30240, and 30253 among other sections of the Coastal Act. Since the LPCA is being challenged in court, the appellant contends that the City should not be able to issue a coastal development permit based on the provisions of that LPCA. The appellant also contends that the City's approval fails to meeting Coastal Act requirements relative to affordable housing, citing Sections 30604(g), 30607.2, and Government Code Section 65590.

Section 30603(b)(1) of the Coastal Act states that the grounds for appeal of a local government's action on a coastal development permit are "...limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division." The allegation that the certified LPCA violates Sections 30235, 30240, and 30253 of the Coastal Act is not an allegation that the City's approval does not conform with the certified local coastal program. In addition, the allegation that the local government's action fails to comply with affordable housing provisions contained in the Coastal Act and Government Code also does not amount to an allegation that the City's approval does not conform with the certified local coastal program. Thus, these allegations are not valid grounds for appeal of the local government's action. The appellant also makes a claim that the City's approval does not conform with the public access policies of Chapter 3 of the Coastal Act. This claim is discussed below.

To the extent the appellant is claiming that the normal standard of review should not apply when the very document establishing that standard of review (the LCP) is being challenged, that claim fails to recognize that the Legislature provided for the circumstance in which the Commission must act on an appeal while the validity of the applicable LCP is being litigated. If application of the LCP is prohibited or stayed, the Commission reviews the CDP application for "conformity with the provisions of Chapter 3." Pub. Res. Code § 30520(a). Presumably, then, in the absence of a stay or other prohibition, the Legislature intended the Commission to continue to apply the disputed LCP as the standard of review. Since no stay has been issued in this case, the LPCA remains effective, and the Commission relies upon it for the standard of review.

- ii. The City's CDP violates Coastal Act Section 30213 because the project doesn't mitigate for the loss of beach

The appellant asserts that the City's coastal development permit approves a seawall that will cover sandy beach and will result in additional losses to sandy beach through passive erosion. The appellant claims that the loss of sandy beach, and the failure to require mitigation for such loss, is inconsistent with Section 30213 of the Coastal Act.

In its authorization of the LCP amendment for the Dana Point Headlands, the Commission found that approval of a new shoreline protective device to protect proposed new development in the Strand area would be inconsistent with several Coastal Act policies, including Section 30213 of the Coastal Act. However, the life of the existing revetment could be extended through repair and maintenance, and pursuant to Section 30610(d) of the Coastal Act, such work is normally exempt from coastal development permit requirements. Although this particular form of work falls within various exceptions to the 30610(d) exemption, under Section 13252(a) of the Commission's regulations, those exceptions only establish that the methods by which the work is performed



remain subject to review to ensure consistency with Coastal Act policies or applicable LCP policies designed to protect coastal resources. Accordingly, the certified LCP contains provisions that prohibit the construction of new development that relies on a new shoreline protective devices (COSE 2.28), but allows the repair and maintenance of existing shoreline protective works at the Strand themselves, provided the methods for any such work meet certain criteria (COSE Policies 2.22, 2.23, 2.31, HDCP Section 3.5.G). Since the appellant is not challenging the method proposed for the work, but the continued existence of the seawall itself, the determination of whether the issue raised by the appellant constitutes a ‘substantial issue’ regarding consistency with Section 30213 hinges upon whether the City’s approval limits work upon the revetment to that which can be classified as ‘repair and maintenance’ or whether such work amounts to ‘new development’.

At least one condition imposed by the City attempts to address the above-identified issues. Condition No. 159 (Exhibit 6, page 38) of the City’s approval states that “[r]epair and maintenance of the revetment shall be in accordance with plans reviewed and approved by the Director of Public Works and consistent with the HDCP including but not limited to...” the required realignment, the removal of existing dislodged material from the beach, the limitation on height to +17 feet NGVD, and implementation of a maintenance and monitoring plan for the revetment. All of these cited limitations are consistent with requirements identified in COSE Policy 2.22 and HDCP Section 3.5.G in the certified LCP. However, the condition fails to identify the limitations within COSE Policy 2.23 that limits the importation of new rock to no more than 50%.

The record supplied by the City contains a document prepared by Noble Consultants dated January 7, 2005, titled ‘Estimate of Maximum Allowable New Revetment Material for Strand Revetment Repair’ (Exhibit 10). That document estimates the total volume of the existing revetment is 15,300 cubic yards, and thus concludes that up to 7,650 cubic yards of new rock could be included in the project and still qualify as ‘repair and maintenance’. Noble Consultants’ analysis states that the repair can be accomplished using less than the identified maximum. However, Noble Consultant’s analysis indicates that all of these calculations are estimates that are based on average estimated volumes. Accordingly, actual conditions may vary that could change the quantity of allowable new rock. Given that circumstance, it is particularly important that the all of the key criteria and limitations relative to repair and maintenance be referenced in the conditions of approval so that it remains clear that if field conditions reveal circumstances different from the preliminary estimates, that adjustments are made to assure the work can continue to be considered ‘repair and maintenance’. Nevertheless, the City’s approval does not identify these key criteria and limitations. As discussed further in the analysis of the Commission’s appeal below, these issues become further pronounced given other provisions in the City’s approval that would appear to allow unilateral changes to the project at the recommendation of the project geologist or geotechnical engineer.

The appellant goes on to identify at least two mitigation measures, purchase of replacement land, and/or provision of funding for sand replenishment, that the appellant believes ought to have been considered by the City to offset adverse impacts to the beach caused by the revetment. If the work upon the revetment exceeds ‘repair and maintenance’ then LCP policies and the public access and recreation policies of the Coastal Act would necessitate the consideration of such measures. For instance, COSE Policy 2.21 requires, in part, that “[m]aximum feasible mitigation shall be incorporated into the project in order to minimize adverse impacts to resources including local shoreline sand supply”. Similarly, Coastal Act Section 30210 requires that “...maximum access...” be provided and Section 30213 of the Coastal Act requires the provision and protection of lower

cost recreation facilities (such as beaches). The City's approval does not consider the issues raised by the appellant.

Thus, given the City's failure to clearly establish specifications or limitations relative to the quantity of additional material that may be added to the revetment in their approval, the Commission finds that a substantial issue exists regarding whether the City's approval could be interpreted to permit work upon the revetment that would constitute not only 'repair and maintenance,' but also 'new development'. New development would not be exempt and would thus be subject to the provisions of Section 30213 of the Coastal Act. Accordingly, there is a substantial issue as to whether the City's approval conforms to the requirements of Section 30213 of the Coastal Act.

- iii. The City's CDP allows more than 11.29 acres of ESHA to be impacted and thus violates the LCP

The appellant contends that the City's approval allows impacts to ESHA that exceed the limitations upon ESHA impacts identified in the LCP. Specifically, the appellant contends that Condition No. 154 (Exhibit 6, page 37) allows for the construction of walls within ESHA, and that the approved project allows vegetation removal for a utility line that crosses between the hotel site (Planning Area 9) and the residential development in the bowl area (Planning Area 6) (see Exhibit 2 for location of these planning areas, and Exhibits 8 & 9 for location of utility crossing). The appellant contends these activities could result in ESHA removal that exceeds the 11.29 acres of ESHA impact allowed by the LCP.

The record submitted by the City does not contain rough grading plans, however, certain grading details are identified on the tentative tract map (no. 16331), the 'clearing and grubbing' plan, and an exhibit prepared by the City titled "ESHA Disturbance through implementation of TTM 16331" (herein 'ESHA Disturbance Exhibit') (Exhibit 8). These documents do show the wall and the vegetation clearing identified by the appellant. However, the documents do not support the appellant's claims relative to exceeding the 11.29 acre ESHA impact cap.

The ESHA Disturbance Exhibit identifies the areas of ESHA impact, which shows the development at but not exceeding the 11.29 acre cap. There is no indication on this exhibit, or other file materials, that walls would be placed outside of the development footprint allowed in the LCP. Furthermore, with respect to the utility/water line, there is a notation on the exhibit which indicates that the ESHA impact quantities "...includes a portion of the relocated waterline easement". Installation of the utility line would involve a one-time disturbance, followed by restoration of the area, which would be part of the hilltop conservation park and greenbelt. Clearly, minor adjustments to the limits of vegetation clearing and grading will need to be made to assure the 11.29 acre cap is not exceeded. Nevertheless, there is no indication that the City's authorization fails to recognize the cap. In fact, the City's approval contains two conditions, Condition No. 11 (Exhibit 6, page 9) and Condition No. 46 (Exhibit 6, page 15) that address the cap<sup>2</sup>.

Based on the file materials submitted by the City and the conditions of approval, there is no evidence that the City's approval would allow impacts to ESHA that exceed the 11.29 acre cap. Accordingly, this claim does not raise a substantial issue as to conformity with the certified LCP.

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<sup>2</sup> Given the issues raised and discussed further in the analysis of the Commission's appeal contentions regarding the structure of the City's conditions, those conditions aren't satisfactory. Nevertheless, those conditions, along with the more definitive file documents, support the conclusion that the City's approval recognizes the cap.

- iv. The City's CDP allows construction of new protective devices to protect existing development, in violation of both Section 30253 of the Coastal Act and the certified LCP

This contention alleges that the approval is inconsistent with both Section 30253 of the Coastal Act and with provisions of the LCP. As noted in subsection i., above, an allegation that the LCPA is inconsistent with Coastal Act Section 30253 is not a valid grounds for appeal of a local government's action on a coastal development permit (see Coastal Act Section 30603(b)(1)).

However, the appellant also alleges that the City has authorized shoring, retaining walls, geogrid, MSE walls, soil nail walls and other protective devices along the bluff face and that such approval is inconsistent with COSE Policy 2.28. Other than stating that such devices are proposed "along the bluff face", the appellant hasn't identified specific locations.

A review of the record supplied by the City reveals that the City has authorized use of the devices noted above in a variety of applications within the development areas in the Strand, bowl, the hotel site, and the commercial site along Coast Highway. However, there is no indication such devices are proposed along conserved bluff areas, such as in the Headlands Conservation Park or the Harbor Point promontory, or seaward of the revetment in the Strand. The only proposed development area where the devices described by the appellant are being used as shoreline and/or bluff protection structures is within the Strand area. However, these are not stand-alone devices functioning apart from the revetment and geologic remediation that was allowed in the Strand. While COSE Policy 2.28 prohibits the use of shoreline and/or bluff protection devices to accommodate new development, that policy cross-references COSE Policy 2.21, which specifically allows geologic remediation and reliance upon a repaired and maintained shoreline protective device in the Strand area. The devices cited by the appellant are an integral part of the geologic remediation efforts in the Strand area, and are not stand alone devices functioning apart from the work allowed to occur in the LCP in the Strand.

In Section iii. above, the Commission has found that there is a substantial issue with respect to the work upon the revetment and whether such work constitutes 'repair and maintenance' or 'new development'. To the extent the appellant is alleging that the City has allowed the revetment to be re-constructed in excess of the 'repair and maintenance' limitations established in the LCP, then the above identified issue raises a substantial issue. On the other hand, COSE Policy 2.28 and 2.21 clearly allow geologic remediation within the Strand, within certain limitations, and such remediation would normally include shoring and walls in that area.

#### **d. Commission Appeal – Analysis of Consistency**

In the Commission's appeal, the following discrepancies are cited: 1) City's approval gives authorization for impacts to Environmentally Sensitive Habitat Area (ESHA) and construction of new development reliant on shoreline protection, but doesn't secure all of the required benefits that the LCP requires to off-set those impacts; 2) City's approval fails to adequately place limits upon the quantity of work that may occur upon the revetment in order for that work to be considered 'repair and maintenance'; 3) the City's authorization does not appropriately limit geologic remediation activities at the site such that those activities are consistent with LCP requirements 4) the City's approval raises questions about the mechanisms the City is using to assure the development is consistent with the LCP and the delegation of certain key decisions about hazards related deed restrictions to City staff; 5) the City's approval fails to secure expungement of all development rights within open spaces; 6) the City's approval does not secure an adequate public

funicular to offset access impacts; 7) the City's approval allows the siting of private stairways upon slopes adjacent to the beach raising visual impact issues and potential privatization of the required public lateral accessway along the top of the revetment; and 8) the City's approval includes plant species that may be inappropriate in the habitat restoration. Each of these contentions is discussed below:

- i. City's approval gives authorization for impacts to Environmentally Sensitive Habitat Area (ESHA) and construction of new development reliant on shoreline protection, but doesn't secure all of the required benefits that the LCP requires to off-set those impacts

The LCP contains allowances for impacts to Environmentally Sensitive Habitat Areas (ESHA) and for shoreline protection work that accommodates new development, but only in conjunction with a project that delivers certain benefits (see Goal 5, introductory narrative, LUE Policy 5.43, LUE Policy 5.44, COSE Policy 2.21, COSE Policy 2.22, COSE Policy 3.12, COSE Policy 6.9, HDCEP Policy 3.5.E, 3.5.G, and 3.7.C.6, among others), as follows: 1) preservation, enhancement, dedication and perpetual management of all but 11.29 acres of environmentally sensitive habitat areas (ESHAs) known to be present at the Headlands; 2) the dedication of the private portion of Strand beach to the public; 3) the construction and dedication of public parks, a public trail network throughout the Headlands, and vertical and lateral public access to and along Strand beach including realigning the existing revetment an average 5 feet landward or easterly than the existing alignment, implementation of a program to retrieve debris from the beach that impedes public access, and constructing a new lateral public access trail on top or landward of the revetment and seaward of the entire length of the Strand residential development; 4) implementation of extensive water quality management best management practices, including but not limited to the construction and maintenance of structural best management practices to treat off-site and on-site run-off; 5) the preservation of significant landforms including the Harbor Point and Headlands bluffs and promontories and the Hilltop; and 6) the provision of lower-cost overnight accommodations (i.e. hostel) in conjunction with the construction of a luxury inn (see Goal 5 of Land Use Element (LUE), and policies LUE 5.42, 5.44, Conservation Open Space Element (COSE) policies 2.21 – 2.23, 3.1, 3.7, 3.12, among others) .

The appellants contend that the approval gives authorization for all of the ESHA impacts and construction of new development reliant on shoreline protection, but doesn't secure all of the required benefits. For example, the approval allows a division of land and grading that impacts ESHA to prepare for development within Planning Area 9 (the Seaside Inn site), but does not require development of the visitor-serving use, the hotel, or require delivery of the beneficial water quality treatment system (including the treatment of off-site acreage) until a future, unspecified time. In addition, delivery of the required 40-bed hostel isn't assured. Rather, its construction is also tied to the hotel development and is deferred to a future uncertain date. On the other hand, the ESHA impacts would occur immediately, without realization of the benefits that substantiated, in part, the encroachment into ESHA.

The above-identified contentions are accurate. The City's approval contains several statements and conditions that suggest that future delivery of the benefits will be provided; however, the time isn't specified and the impacts will be allowed to have occurred. For instance, Condition No. 152 requires delivery of water quality BMPs, and Condition No. 153 (Exhibit 6, pages 36-37) requires delivery of the hostel, both prior to issuance of the certificate of occupancy for the Seaside Inn. However, under Condition No. 122 (Exhibit 6, page 32), the Seaside Inn and the hostel requires a subsequent coastal development permit and neither the timing for application for these facilities nor

approval of the Inn or hostel can be guaranteed. Compounding the issue is the fact that Condition No. 122 allows for construction of the homes to commence without first assuring delivery of the water quality benefits and the hostel. Another potential issue is that under Condition No. 30 (Exhibit 6, page 12), “[s]ecurity may be provided to the City in lieu of constructing the facilities...” including “...all required drainage improvements...”. Thus, the developer could simply pay fees to the City, rather than actually construct the required water quality improvements, which is contrary to LCP requirements that the developer be responsible for delivery of these facilities. Meanwhile, the impacts to ESHA could occur immediately upon activation of the City’s permit. One potential way of addressing the above issues would be to prohibit the ESHA impacts until delivery of the water quality benefits and hostel were assured. Thus, the City’s approval raises a substantial issue as to conformity with the certified LCP.

- ii. City’s approval fails to adequately place limits upon the quantity of work that may occur upon the revetment in order for that work to be considered ‘repair and maintenance’ & the City’s authorization does not appropriately limit geologic remediation activities at the site such that those activities are consistent with LCP requirements

The LCP limits the extent of work on the existing revetment at the Strand to that which would constitute “repair and maintenance” (COSE Policies 2.22 – 2.23, among others). More specifically, COSE Policy 2.23, among its other provisions, limits repair and maintenance of the existing revetment to “...the importation of up to 50 percent new rock by volume, including excavation and new bedding material and foundation...”. The appellants contend that the City’s special conditions identify certain limitations, relative to the footprint and height of the structure, but makes no specifications or limitations relative to the quantity of additional material that may be added to the revetment (Condition No. 159, Exhibit 6, page 39). Without such limitations, the appellants contend the City’s approval cannot be found consistent with COSE Policy 2.23.

In addition, certain other City-imposed requirements could be interpreted as unilaterally allowing the project geologist or geotechnical engineer to require work on the revetment above and beyond what would be considered “repair and maintenance” under the LCP, without any other review or approval. For example, the City’s authorization says “...[p]rior to issuance of a grading permit, to ensure that no undue risk is present during and after development of the project, final recommendations from the geotechnical engineer will be incorporated into the project”[emphasis added] (Exhibit 6, page 6). Accordingly, if the geotechnical engineer recommends augmentation to the revetment in excess of the limits allowable under ‘repair and maintenance’ then this provision of the City’s approval indicates the recommendation would be incorporated. If that augmentation were to occur, the work on the revetment would no longer be considered ‘repair and maintenance’ and such reconstruction would be inconsistent with the LCP. These same geologic provisions would allow other unspecified geologic work to occur, without an additional coastal development permit authorization. Such additional work could lead to inconsistencies with the certified LCP.

Some of the issues raised by this contention are also discussed in the discussion of Surfrider Foundation’s appeal contentions in Section II.D.2.c.ii. above. In summary, the Commission agrees that the City’s failure to identify the 50% limitation in their approval raises a substantial issue as to conformity with the certified LCP, as well as the possible misapplication of adopted special conditions would lead to conflicts with the certified LCP.

- iii. The City’s approval raises questions about the mechanisms the City is using to assure the development is consistent with the LCP and

the delegation of certain key decisions about hazards related deed restrictions to City staff

The City's action includes Condition No. 3 (Exhibit 6, page 8), which states "All development shall be consistent and comply with all requirements of the HDCP as approved and Local Coastal Program Amendment 01-02 (LCPA 01-02) whether or not such requirement are identified herein". In addition, many of the adopted special conditions include categorical statements that the development/work shall be consistent with the certified HDCP and LCP. While these references could be argued to mandate compliance with the certified LCP, the appellants contend that this approach is an inappropriate means of ensuring resource protection. Typically, revised plans mandating necessary changes for compliance are required, to ensure that developers have all relevant requirements enumerated in their project plans; this also supports enforcement efforts, if needed, and provides clarity for public records. Therefore, the appellants contend that reliance on Special Condition No. 3 and other conclusionary references is problematic.

The Commission concurs that the City's approach raises a substantial issue. For example, in the contention discussed above, there are uncertainties as to whether the City is recognizing the 50% limitation upon augmentation of the existing revetment for such work to be considered 'repair and maintenance' because that limitation is not identified in their special conditions (Condition No. 159, Exhibit 6, page 39). The Commission has found that the failure to identify this limitation raises a substantial issue. However, with Condition No. 3, the City could argue that their approval does contain that limitation because their approval 'incorporates' the provisions of the LCP. On the other hand, one could also interpret the City's failure to list the 50% limitation to mean that the City found the 50% limitation somehow not applicable in this instance and declined to implement it because the geologist/geotechnical engineer recommended additional work on the revetment. Without an explicit statement of the 50% limitation, it is difficult if not impossible for any member of the public, or even for City staff, to know for sure how the City was applying (or not applying) the 50% limitation.

The City's approval also raises a variety of issues relative to required deed restrictions. The LCP requires recordation of deed restrictions advising property owners that they must assume the risk of developing in hazardous bluff and shoreline areas (COSE Policy 2.30). However, the City's approval does not specify those lots that must be restricted. Rather, the determination of which lots must be deed restricted is deferred to the discretion of the Director of Public Works (Condition No. 34, Exhibit 6, page 13). The permit should have defined the areas where a deed restriction will be needed instead of leaving it to the Director of Public Works to make those determinations. Only in that way can the approval be assured be consistent with the LCP's requirement for such restrictions. Furthermore, the City-required deed restriction does not address all the hazards (only bluff retreat), nor does it include the indemnification requirement. The Commission finds this issue raises a substantial issue as to conformity with the certified LCP.

- iv. The City's approval fails to secure expungement of all development rights within open spaces

The LCP requires abandonment of Marguerita Road and restoration, dedication and preservation of the area as part of the open space area. The appellants contend that the proposed tract map identifies an ingress/egress easement across the area that is not required to be extinguished in the City's approval. That easement was granted to certain individuals and allows 'pedestrian and vehicular ingress and egress' upon Marguerita Road. Such ingress/egress by pedestrians and vehicles would result in disturbance to the restored habitat area. Failure to require extinguishment

of all development rights/easements that may allow disturbance to the area reserved as open space raises questions of the consistency of the approval with the requirement that the CDP authorization "...fully expunge all development rights that may exist within the identified public parks, open space and public trail network"... (See Section 3.7.C.6, Development Phasing Plan).

The Commission concurs that the issue raises a substantial issue. Condition No. 144 (Exhibit 6, page 36) of the City's approval requires removal and restoration, or 'security' for such removal and restoration, of Marguerita Road. However, there is no mention of expungement of the easement. Furthermore, the mere provision of 'security' for the road removal and habitat restoration is not adequate; the removal and restoration is the developers' obligation under the LCP. The LCP clearly requires that all development rights within the parks, open spaces and trail network be expunged. The City's authorization contains no such requirement, thus there is no apparent requirement that the ingress/egress easement would be expunged. The easement holder could attempt to exercise that easement in the future, resulting in impacts to sensitive habitat, which would be inconsistent with LCP requirements mandating protection of retained and restored ESHA. Thus, this issue raises a substantial issue as to conformity with the certified LCP.

- v. The City's approval does not secure an adequate public funicular to offset access impacts

Section 30210 of the Coastal Act requires the provision of 'maximum' access to and along the shoreline. However, the Headlands development plan included a prohibition of public vehicular access to the Strand residential community. To address concerns relative to that public access prohibition, the Commission required the inclusion of certain policies in the LCP to assure consistency with the public access and recreation policies of the Coastal Act. For instance, the certified LCP requires that any prohibition upon public vehicular access into the Strand residential area be offset with the provision of a public funicular extending from the County parking area to the beach (LUE Policies 5.35, 5.36, HDCP Section 3.4.C.5, among others). These policies have specific requirements relative to periods of operation, and fees as well as size of the vehicle ("...sized to a minimum capacity of eight persons..." and having "...sufficient capacity to ferry a family and associated beach recreational paraphernalia (e.g. chairs, coolers, surfboards, etc.)").

The appellants contend there are ambiguities relative to the passenger capacity and operational requirements of the funicular in the City's approval. The City's approval contains several conditions pertaining to the funicular. For instance, Condition No. 50 (Exhibit 6, page 16) requires a public funicular if the Strand residential area is gated, but no other details are identified. In addition, Condition No. 142 (Exhibit 6, page 35) states that the entryway street to the Strand residential can't be closed to public vehicular traffic until a certificate of occupancy for the funicular is issued; requires maintenance provisions to be in place before issuance of the building permit, and states that the City will take no responsibility for construction, operation or maintenance of the funicular. The LCP contains many requirements relative to the days of operation, the size of the funicular, and the maximum fee. Of particular importance, the LCP also contains specific requirements relative to the temporary and/or permanent re-opening of the Strand residential area to public vehicular access should the funicular become inoperable for extended periods. Nevertheless, the City's authorization contains no details regarding the size of the funicular, required days and hours of operation, or the fee for use (if any); nor are there provisions for the re-opening of the Strand when the funicular is inoperable.

The City's record also contains few details regarding the funicular. The only details include a photograph of a vehicle and the general alignment of the facility. Thus, it appears that many of the

details regarding the funicular would be left to the discretion of City staff, rather than mandated by the permit. The Commission finds these ambiguities raise a substantial issue as to conformity with the LCP and the public access and recreation policies of the Coastal Act.

- vi. The City's approval allows the siting of private stairways upon slopes adjacent to the beach raising visual impact issues and issues regarding potential privatization of the required public lateral accessways

The appellants contend that the City's approval allows for the construction of stairways on the slope seaward of the seawardmost line of residential structures in the Strand with multiple connections to the public lateral accessway along the revetment. Such structures raise issues relative to visual impacts and privatization of the lateral public accessway that is required to be constructed along the top of the repaired and maintained revetment.

The identified stairways are depicted on a proposed landscape plan and within the 'Design Guidelines' for the Strand residential area dated November 2004. The stairways would descend from the level building pad for the homes upon the graded slope to the public lateral accessway along the revetment (Exhibit 11). There would be at least 13 stairways along the accessway (1 stairway to be shared by 2 adjoining lots).

Land Use Element Policy 5.4 prohibits new development that would significantly degrade public views to and along the coastline. In addition, Conservation Open Space Element Policy 3.17 prohibits new structures on bluff faces. The proposed stairs raise a substantial issue as to conformity with these LCP policies.

The lateral public accessway along the Strand revetment is a key component of the public access program in the certified LCP. When the surf is breaking upon the back beach and the revetment, lateral access upon the sandy beach will be hazardous, if not impossible. The lateral public access along the top of the revetment, thus, would provide the only lateral access along the shoreline during those (potentially extended) periods. This lateral access would run seaward of, and parallel to, the first line of homes in the Strand at a mid-point along a graded slope leading down to the beach. The construction of multiple private stairways with direct linkage to the lateral access, which is located in a confined corridor seaward of the homes, will create the appearance that the lateral accessway is intended to provide access to the private stairways, rather than serve as a lateral public accessway for use by the public. Thus, the privatization of the required lateral public access along the shoreline would not be protective of lower cost recreational facilities and thus would be inconsistent with Section 30213 of the Coastal Act and equivalent LCP policies.

- vii. The City's approval includes plant species that may be inappropriate in the habitat restoration.

The appellants contend that the City's approval allows certain plant species to be planted that are inappropriate within the habitat restoration. A review of the proposed on-site mitigation and revegetation plan (by URS Corporation dated December 2, 2004) does reveal that certain plant species, such as Laurel sumac and coffee berry are proposed but apparently are not currently present within the coastal scrub habitats. Accordingly, those species should be removed from the plan or their presence ecologically justified.



However, the City's approval contains Condition No. 140 (Exhibit 6, page 35) which requires use of only plants native to coastal Orange County and appropriate to the habitat type. Thus, the issue appears to have been adequately addressed in the City's approval. Thus, this issue does not raise a substantial issue as to conformity with the LCP.

**e. Significance of Issues Raised by Appeal**

The Dana Point Headlands is the last large (approximately 121 acres), relatively undeveloped area of land within the City of Dana Point's coastal zone, and among the few remaining such areas of its size along the Orange County coastline. For its significant habitat, recognizable and visually stunning landforms, and remarkable views, the Dana Point Headlands is one of the California coastline's landmark resources –of local and statewide significance- worthy of the most careful planning efforts.

Development of the subject property involves a number of challenges and constraints, but also certain benefits the Commission found to be significant and thus approved an LCP amendment. Development at the site will impact 11.29 acres of environmentally sensitive habitat area, will require significant geologic remediation in the Strand and reliance upon shoreline protection, and will result in landform alteration. However, the proposal would also place approximately 47 acres of existing ESHA into protected conservation areas with additional lands and would be accompanied by significant habitat restoration and include long-term management provisions. The project allowed by the LCPA also includes dedication of beach, an extensive public trail network, water quality management improvements, and lower cost overnight accommodations (a 40-bed hostel).

Through certification of the LCP, the City was delegated the responsibility to assure implementation of a development plan at the Headlands that delivers all of the benefits promised to the public in a timely and unambiguous manner. The City's approval allows development to commence at the site, including a land division, significant clearing of sensitive vegetation, and grading of the site to prepare it for construction of homes, commercial, and public amenities. However, that approval contains ambiguities regarding the amount of work allowed upon the revetment and whether appropriate mitigation has been secured for associated beach impacts. In addition, key benefits promised to the public are deferred and their provision is not assured. There are also significant questions regarding the structure and legal adequacy of the City's conditions. The approval granted by the City is critical in that it lays the foundation for development to occur now and in the future at the site. All inconsistencies in the City's approval with the LCP will have lasting effects, including potential long-term enforcement problems, and could result in adverse impacts upon public access, visual resources, and sensitive biological habitat. Accordingly, the appellants' contentions raise concerns about the future interpretation and enforceability of adopted conditions to ensure LCP compliance. In addition, in the absence of securing all the off-setting benefits proposed in the LCP, while now allowing all the direct impacts to identified ESHA to proceed, it is clear that sufficient mitigation has not been provided and significant coastal resources and public access opportunities are at risk. Therefore, the appeal is both precedential and raises issues of statewide significance.

**f. Conclusion**

For the reasons stated above, the appeal raises a substantial issue of consistency with the regulations and standards set forth in the certified City of Dana Point LCP and the public access policies of the Coastal Act.